

THE LAW OF INTERNATIONAL WATERWAYS: AN APPROACH TO A SUEZ CANAL SOLUTION

Widespread concern over the present Suez Canal crisis reflects the critical importance of major narrow "international"¹ waterways in world commerce. The relative importance of each waterway as a navigable channel depends on the existence of a favorable trade pattern between areas connected by the way, the comparative inconvenience of alternate routes and the narrowness of the channel. All three factors combine to accentuate the vital position of the Suez Canal, whose recent blockage seriously disrupted an interdependent world economy.²

Any plan for restoration of order in the canal zone, and hence in the Middle East, must include a full revision of the Constantinople Convention of 1888,³ the major international agreement controlling the Suez Canal. This convention is ambiguous,⁴ unrealistic,⁵ antiquated⁶ and too narrow in scope⁷ and application.⁸ A fair, yet practicable, revision must reflect the needs and desires of the relevant interest groups, the efficacy of past and present legal controls, and the limitations as well as potentialities of such a convention as an instrument of peace. Legal principles will be derived primarily from treaties,⁹ customary law¹⁰ and unilateral regula-

1. Straits and canals, though often wholly within the territorial jurisdiction of a single state, are "international" in the sense that other nations find them useful for navigational purposes. See Corfu Channel Case, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, 161.

2. See, e.g., N.Y. Times, Jan. 2, 1957, p. 1, col. 6; N.Y. Times, Jan. 3, 1957, p. 47, cols. 3-5; N.Y. Times, Jan. 13, 1957, § 4, p. 6, col. 1; Wall Street Journal, Feb. 18, 1957, p. 1, col. 1.

3. Hereinafter cited as Constantinople Convention. The text of the convention has been reprinted in U.S. DEP'T OF STATE, THE SUEZ CANAL PROBLEM 16 (1956) (hereinafter cited as THE SUEZ CANAL PROBLEM); 3 AM. J. INT'L L. 123 (Supp. 1909); 35 DEP'T STATE BULL. 617 (1956); N.Y. Times, Sept. 13, 1956, p. 12, cols. 3-6.

4. See, e.g., problem of discrimination discussed in text at note 149 *infra*.

5. See particularly the restrictions imposed upon a belligerent Egypt discussed in text at notes 85, 96, 105 *infra*.

6. Aside from the need to modernize terminology, the convention needs to be redrafted in the current economic, military and political context, with due regard for such international institutions as the United Nations and the International Court of Justice. See text at notes 111-16, 188-91, 205, 217 *infra*.

7. The entire matter of canal tolls, in particular, received no mention in the Constantinople Convention. See text at note 197 *infra*.

8. See notes 9, 22 *infra*.

9. The three major inter-oceanic canals have been regulated primarily by international treaty arrangements, said to impose "servitudes" on the riparian power. FENWICK, INTERNATIONAL LAW 398 (3d ed. 1948); REID, INTERNATIONAL SERVITUDES IN LAW AND PRACTICE 137-39 (1932). At present only the United States, Great Britain and Panama are treaty-bound to respect rights of passage through the Panama Canal, for "a third state cannot incur legal obligations under a treaty to which it is not a party." ROXBURGH, INTERNATIONAL CONVENTIONS AND THIRD STATES 29 (1917). See also *id.* at 19, 29-31, 71. The United States concluded the Hay-Pauncefote Treaty, Nov. 18, 1901, 32 STAT. 1903, T.S. No. 401 (hereinafter cited as Hay-Pauncefote Treaty), with Great Britain, and the Hay-Bunau Varilla Treaty, Nov. 18, 1903, 33 STAT. 2234,

tions¹¹ governing all canals of major importance as international waterways, *viz.*, the Panama, Suez and Kiel canals.¹²

BACKGROUND OF THE PRESENT CRISIS

*Suez Canal History*¹³

A brief review of Suez Canal history is necessary for a better understanding of recent events and the current alignment of interest groups. When the canal opened in 1869, operation was committed to the Universal Suez Canal Company pursuant to a ninety-nine year concession.¹⁴ A fifteen per cent royalty¹⁵ and forty-four per cent stock interest¹⁶ held by Egypt assured that country's sympathy with the new company's efforts in seeking more traffic and higher tolls. As use of the canal gradually

T.S. No. 431 (hereinafter cited as Hay-Varilla Treaty), with the Republic of Panama. Only a few of the currently powerful countries are obligated in respect to Suez Canal traffic by the Constantinople Convention. See note 22 *infra*. But see 1 WHEATON, INTERNATIONAL LAW 520 (6th ed. 1929) wherein it is suggested that minor powers may be bound by tacit consent. Furthermore, it is doubtful whether the Kiel Canal remains subject to the Treaty of Peace With Germany, June 28, 1919, S. Doc. No. 51, 66th Cong., 1st Sess. 483-85 (hereinafter cited as Treaty of Versailles). See Kiel Canal Collision Case, German (British Zone) Supreme Court, [1950] INT'L L. REP. 133, 134 (Lauterpacht ed. 1956). However, it is reported that the Kiel Canal is currently operated in accordance with Versailles Treaty provisions. Letter from Renate Kalischer, Inter-Nationes, Bonn, Germany, to the *University of Pennsylvania Law Review*, March 8, 1957, on file in Biddle Law Library. Finally, only the Constantinople Convention and the Treaty of Versailles may reasonably be interpreted as conferring navigational rights on third parties. ROXBURGH, *op. cit. supra* at 51-54, 57, 58, 63-71; Secretary of State Dulles' News Conference, Sept. 26, 1956, 35 DEP'T STATE BULL. 543, 545 (1956).

10. Customary international law may develop through prolonged practice among nations, which may in fact be consistent with provisions of relevant treaties. See ROXBURGH, *op. cit. supra* note 9, at 94-95, 103; 1 WHEATON, *op. cit. supra* note 9, at 521. Consequently, one author, at least, has suggested that the right of passage through international canals is no longer derived from treaties imposing servitudes, but from over a half-century of custom. See Baxter, *Passage of Ships Through International Waterways in Time of War*, 31 BRIT. Y.B. INT'L L. 187, 214-15 (1956).

11. See 35 C.F.R. §§ 1-30 (1949) (Panama Canal); UNIVERSAL SUEZ MARITIME CANAL COMPANY, RULES OF NAVIGATION (1953) (Suez Canal).

12. Some of the rules regulating traffic through international straits provide useful analogies and will herein be given footnote treatment. As to whether the artificial nature of canals demands a unique set of governing principles, compare Lawrence, *The Suez Canal in International Law*, in MODERN INTERNATIONAL LAW 37, 38-40, 44-45 (1884), with HOLLAND, STUDIES IN INTERNATIONAL LAW 277 (1898). Of course, many of the legal controls governing international canals should, and do, parallel those controlling international straits. See Baxter, *supra* note 10, at 187.

13. For history of the Suez Canal, see, *e.g.*, HALLBERG, THE SUEZ CANAL (1931); WILSON, THE SUEZ CANAL (1933). For a short but valuable historical account of the Suez Canal as a waterway, see Hoskins, *The Suez Canal as an International Waterway*, 37 AM. J. INT'L L. 373 (1943).

14. Act of Concession of the Viceroy of Egypt for the Construction and Operation of the Suez Maritime Canal and Appurtenances Between the Mediterranean Sea and the Red Sea, Nov. 30, 1854, art. III, THE SUEZ CANAL PROBLEM 1, 2 (hereinafter cited as Act of Concession, 1854); Act of Concession of the Viceroy of Egypt, and Terms and Conditions for the Construction and Operation of the Suez Maritime Canal and Appurtenances, Jan. 5, 1856, art. XVI, THE SUEZ CANAL PROBLEM 4, 7 (hereinafter cited as Act of Concession, 1856); Convention Between the Viceroy of Egypt and the Compagnie Universelle du Canal Maritime de Suez, Feb. 22, 1866, art. XV, THE SUEZ CANAL PROBLEM 9, 15.

15. Act of Concession, 1854, art. V; Act of Concession, 1856, art. XVIII.

16. Purchased by Egypt in 1858. See WILSON, THE SUEZ CANAL 22 (1933).

mounted, the expanding group of users became increasingly aware of the high tolls and the economic importance of the canal. Consequently, Great Britain, the major user country, moved to secure her interest by purchasing the Egyptian Khedive's shares of stock in 1875,¹⁷ thereby obtaining a voice on the company board of directors, and by later remaining in occupation of Egypt after suppressing a local revolt in 1882.¹⁸ Egypt's interests were almost completely divorced from those of the company when, in 1880, the Khedive was forced to relinquish the fifteen per cent royalty to cover outstanding debts.¹⁹ Nevertheless, the users' concern over protection of their vital inter-oceanic channel continued. Although the 1856 concession required the company to grant free and equal passage to all merchantmen,²⁰ the user nations incorporated a series of guarantees of passage for all ships at all times into a multilateral convention²¹ signed by the Powers²² at Constantinople in 1888. Great Britain, however, made a reservation to the convention, preventing interference with British activity in Egypt.²³

Although the British withdrew their reservation to the convention in 1904,²⁴ the influence of Great Britain in Egypt remained at a high level through 1914, when the former declared Egypt a British protectorate.²⁵ Since World War I, British influence in Egyptian and canal affairs has decreased at an accelerated pace: in 1922 the protectorate was ended and Egypt declared independent;²⁶ in 1947 the British completed withdrawal from all Egypt save the canal zone;²⁷ in 1954 all British troops withdrew from the canal zone;²⁸ in late 1956 British prestige in the area reached

17. *Id.* at 44-58.

18. *Id.* at 63-64.

19. The Suez Canal, Egyptian Embassy Press Release, Aug. 10, 1956, p. 8. However, in 1937 and 1949, the Canal Company agreed to increase Egyptian personnel, and promised substantial annuities to Egypt. See 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 819-23 (1941); SCHONFIELD, *THE SUEZ CANAL IN WORLD AFFAIRS* 131-32 (1953).

20. Act of Concession, 1856, arts. XIV, XV.

21. See note 3 *supra*.

22. Signatories were Austria-Hungary, France, Germany, Great Britain, Italy, Netherlands, Russia, Spain and Turkey. See note 9 *supra*.

23. See Hoskins, *supra* note 13, at 377.

24. Declaration Between the United Kingdom and France Respecting Egypt and Morocco, April 8, 1904, art. VI, 1 AM. J. INT'L L. 6, 7-8 (Supp. 1907).

25. SCHONFIELD, *op. cit. supra* note 19, at 69.

26. *Id.* at 75.

27. SCHONFIELD, *op. cit. supra* note 19, at 120. Termination of the British military occupation of Egypt was agreed to in the Treaty of Alliance Between the United Kingdom of Great Britain and Northern Ireland and Egypt, Aug. 26, 1936, art. I, 173 L.N.T.S. 402, 404. Occupation of the Suez Canal zone was retained under article VIII, *id.* at 406.

28. Pursuant to the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Egyptian Government Regarding the Suez Canal Base, art. I, *THE SUEZ CANAL PROBLEM* 20, 21. See Selak, *The Suez Canal Base Agreement of 1954*, 49 AM. J. INT'L L. 487 (1955). Egypt announced abrogation of the 1954 agreement on January 2, 1957, to be effective as of October 31, 1956, the date of the first Anglo-French attack. The British Foreign Office, however, has denied the validity of any such attempted abrogation. N.Y. Times, Jan. 3, 1957, p. 1, col. 2.

its low with withdrawal, at the insistence of the United Nations, of Anglo-French invasion forces.²⁹ Ironically, Great Britain's economic reliance on the Suez Canal has simultaneously increased, as her industrialized economy has grown dependent upon oil obtained principally from Middle East sources while her trade patterns, necessitating passage through the canal, have remained basically the same.

Since 1948, Egypt has begun to assert fully her position as littoral sovereign by preventing Israeli ships and "contraband" from moving through the canal. A United Nations Security Council resolution of 1951³⁰ condemning this action has gone unheeded and unenforced. Unlike the discrimination against Israel which, for the most part, affected only the two countries, the 1956 nationalization³¹ of the canal company by Egypt has touched off the worst crisis in a century of Suez Canal controversy.

Britain and France, fearing higher tolls,³² the encouragement given by such a precedent to the nationalization of Middle East oil sources and the rising prestige of President Nasser, openly opposed the nationalization, making fleet and troop movements into the Eastern Mediterranean. Shortly thereafter, the First London Conference of user nations met³³ and authorized a five-nation Suez Committee³⁴ to present to the Egyptian president a plan,³⁵ supported by eighteen³⁶ of the twenty-two nations at the conference, for international operation of the canal. President Nasser rejected outright any form of international operation,³⁷ and proposed instead im-

29. N.Y. Times, Dec. 23, 1956, p. 1, col. 8.

30. U.N. Doc. No. S/2322 (1951).

31. For text on the presidential decree, see President of the Republic Order Concerning the Issuance of Law No. 285 of 1956 on the Nationalization of the Universal Company of the Suez Maritime Canal, July 26, 1956, *THE SUEZ CANAL PROBLEM* 30. Although some Egyptian spokesmen rationalized seizure as necessary to provide improved canal services, see, e.g., The Suez Canal, Egyptian Embassy Press Release, Aug. 10, 1956, p. 12, President Nasser explained to the Egyptian people that large canal revenues would now be made available to finance the projected Aswan Dam. Address by President Nasser, Alexandria, Egypt, July 26, 1956, *THE SUEZ CANAL PROBLEM* 25, 27-28, U.S. News & World Report, Aug. 17, 1956, p. 77. For commentary on the legality of nationalization, see Notes, *Nationalization of the Suez Canal Company*, 70 HARV. L. REV. 480 (1957), *A Lawyer Looks at Suez*, 100 SOL. J. 660 (1956).

32. Broadcast by Prime Minister Eden, Aug. 8, 1956, U.S. News & World Report, Aug. 17, 1956, p. 81.

33. First London Conference sessions were held August 16-23, 1956. See *THE SUEZ CANAL PROBLEM* 55-293.

34. Australia, Ethiopia, Iran, Sweden and the United States. For a documentary account of the Committee's Cairo activities, see *id.* at 303-26.

35. The text of the plan has been reprinted in *id.* at 307-09; 35 DEP'T STATE BULL. 373 (1956); N.Y. Times, Sept. 10, 1956, p. 6, col. 4. See also Letter from Prime Minister Menzies, Suez Committee Chairman, to President Nasser, Sept. 7, 1956, *THE SUEZ CANAL PROBLEM* 309, 35 DEP'T STATE BULL. 472 (1956), N.Y. Times, Sept. 10, 1956, p. 6, col. 1.

36. Australia, Denmark, Ethiopia, France, Germany, Iran, Italy, Japan, Netherlands, New Zealand, Norway, Pakistan, Portugal, Spain, Sweden, Turkey, United Kingdom and the United States. Those who withheld approval were Ceylon, India, Indonesia and the U.S.S.R.

37. Letter from President Nasser to Prime Minister Menzies, Suez Committee Chairman, Sept. 9, 1956, *THE SUEZ CANAL PROBLEM* 317, 35 DEP'T STATE BULL. 472 (1956), N.Y. Times, Sept. 10, 1956, p. 6, col. 6.

mediate consideration of a meeting to negotiate solutions to questions relating to: (a) the freedom and safety of navigation in the Canal, (b) the development of the Canal to meet the future requirements of navigation, and (c) the establishment of just and equitable tolls and charges.³⁸ He further indicated that such a meeting should be given "the task of reviewing the Constantinople Convention of 1888."³⁹ However, the Second London Conference⁴⁰ considered these proposals as "too imprecise to afford a useful basis for discussion."⁴¹ The representatives of the user governments proceeded to organize formally the Suez Canal Users Association,⁴² originally planned as a lever to force Egypt to accept international control, but by then regarded as a consultative body that might facilitate interim maritime arrangements if Egypt failed to maintain normal canal traffic.⁴³

Through exploratory conversations held at the U.N. in late September 1956, the foreign ministers of Egypt, France and the United Kingdom agreed on six basic principles⁴⁴ for settlement of the dispute. The Security Council passed⁴⁵ a resolution⁴⁶ embodying the six principles, but the Soviet Union vetoed⁴⁷ a British-French proposal for international operation of the canal.⁴⁸ Discussion then terminated and the Suez Canal Users Association resumed organizing functions,⁴⁹ when Israel invaded the Sinai peninsula on October 29, 1956.⁵⁰ Upon the failure of Egypt and Israel to respond to an Anglo-French cease-fire ultimatum,⁵¹ France and Great Britain bombed the canal area and, notwithstanding a U.N. General Assembly resolution⁵² demanding a cease-fire and withdrawal of Israeli

38. THE SUEZ CANAL PROBLEM 329, N.Y. Times, Sept. 18, 1956, p. 6, col. 4.

39. *Ibid.*

40. The Second London Conference met September 19-21, 1956. See THE SUEZ CANAL PROBLEM 353-67.

41. Statement issued by the Second London Conference on the Suez Canal at final session, Sept. 21, 1956, *id.* at 366, 35 DEP'T STATE BULL. 507 (1956).

42. Text of Declaration Providing for the Establishment of a Suez Canal Users Association annexed to Statement issued by the Second London Conference on the Suez Canal at final session, Sept. 21, 1956, THE SUEZ CANAL PROBLEM 365, 35 DEP'T STATE BULL. 508 (1956).

43. Statement by Secretary of State Dulles at 1st Plenary Session of Second London Conference, Sept. 19, 1956, THE SUEZ CANAL PROBLEM 353, 355-56, 35 DEP'T STATE BULL. 503, 504 (1956). See also purposes outlined in the declaration issued at the Second London Conference providing for the establishment of a Suez Canal Users Association, cited note 42 *supra*, and in Secretary of State Dulles' News Conference, Sept. 26, 1956, 35 DEP'T STATE BULL. 543, 546 (1956).

44. N.Y. Times, Oct. 13, 1956, p. 1, col. 8. See text at note 64 *infra*.

45. N.Y. Times, Oct. 14, 1956, § 1, p. 1, col. 8.

46. U.N. Doc. No. S/3675 (1956); see 35 DEP'T STATE BULL. 616 (1956).

47. N.Y. Times, Oct. 14, 1956, § 1, p. 1, col. 8.

48. See U.N. Doc. No. S/3671 (1956); 35 DEP'T STATE BULL. 616 & n.9 (1956).

49. See Resolution on the Organization of the Suez Canal Users Association, 35 DEP'T STATE BULL. 580 (1956). An administrator for the association was soon appointed. N.Y. Times, Oct. 20, 1956, p. 1, col. 6.

50. N.Y. Times, Oct. 30, 1956, p. 1, col. 8.

51. N.Y. Times, Oct. 31, 1956, p. 1, col. 8.

52. U.N. Doc. No. A/3256 (1956). The General Assembly acted pursuant to the Uniting for Peace Resolution passed by the U.N. General Assembly in November

forces, invaded the canal zone. After a few days a cease-fire was obtained,⁵³ and the invading forces withdrew⁵⁴ when a U.N. Emergency Force,⁵⁵ with Egypt's consent, entered the canal area. In the interim, the canal had become completely blocked by wreckage.⁵⁶ While petroleum shortages threatened the economies of Great Britain and Western Europe, clearance of the canal was undertaken by the United Nations at Egypt's request. Egypt opened the canal to most small ships by early April 1957, after issuing a unilateral declaration of principles governing future canal operations^{56a} and indicating it would continue to bar Israeli ships.⁵⁷

Relevant Interest Groups

Any new agreement will probably be negotiated with Egypt by the governments of the major user nations. Since the closing of the Suez Canal, all those who ship, produce or deal in commodities normally passing through the canal have lost income and found their competitive position threatened by suppliers not dependent upon the canal.⁵⁸ Furthermore, consumers have experienced severe shortages with consequent higher prices and rationing.⁵⁹ The economic dependency of a country such as Great Britain upon oil and general maritime trade via the canal, and the question of passage for warships, make the problem immediately one of vital political concern to that nation and its allies. The self-interest of canal users requires for them a right of transit subject only to rules designed to provide safe and speedy passage for all shipping and to protect the "sovereignty" of the littoral power.

Another major interest is that of the littoral sovereign, Egypt. To her, the canal is a potential source of revenue and employment, a reason for recurring foreign occupation of Egypt, a threat to adequate enforcement of customs, immigration and health laws, and an international political

1950, U.N. Doc. No. A/1481 (1950). See statement by Secretary of State Dulles in the General Assembly, Nov. 1, 1956, 35 DEP'T STATE BULL. 751 (1956). This course of action was invoked by seven members of the Security Council immediately following the veto by France and Great Britain of a proposed Security Council resolution calling for an Israeli-Egyptian cease-fire, withdrawal of Israeli forces behind the established armistice lines and a prohibition on the use or threat of force inconsistent with the purposes of the United Nations. U.N. Doc. No. A/3256 (1956).

53. Subsequent to a second cease-fire resolution, U.N. Doc. No. A/Res/392 (1956), and preliminary resolutions establishing the United Nations Emergency Force, see note 55 *infra*.

54. N.Y. Times, Dec. 23, 1956, p. 1, col. 8. Withdrawal had been demanded by a General Assembly resolution of Nov. 7, 1956, U.N. Doc. No. A/Res/396 (1956), reiterated Nov. 24, 1956, U.N. Doc. No. A/Res/410 (1956).

55. Formed pursuant to General Assembly resolutions, U.N. Doc. Nos. A/Res/391, 394-95 (1956).

56. The canal was blocked by about fifty ships. Some of these were sunk by bombings but, apparently, most were scuttled by the Egyptians. See N.Y. Times, Nov. 23, 1956, p. 14, col. 3.

56a. N.Y. Times, March 29, 1957, p. 2, cols. 4-8.

57. N.Y. Times, March 16, 1957, p. 1, col. 8.

58. See citations at note 2 *supra*.

59. *Ibid.*

lever of immense power. Moreover, to Egypt and other members of the Arab-Asian bloc, foreign control of the canal represents the vestigial remains of colonialism. Thus, for political and economic reasons the Egyptian government is likely to insist that it retain operation of the canal and to concede few limitations on its sovereignty. Presumably desirous of a sizeable revenue from canal traffic, Egypt will probably want to minimize the operational expense and charge the highest rates obtainable for use of the canal.

The Universal Suez Canal Company constitutes a third interest group. The predominance of non-Egyptian personnel, directors and shareholders has in the past meant correspondingly less revenue, employment and political leverage for Egypt. Also, the company has continually sought high tolls, contrary to the users' self interest. Because of Egypt's nationalization of the company and premature cancellation of the concession, the company's present interest will probably be restricted to compensation for its property loss.

The United Nations organization, as representative of the totality of interests, may be considered to have an important interest of its own in enhancing its position as an instrument of peace by at least providing facilities and impartial intermediaries for the negotiation of a new Suez Canal convention and a permanent resolution of the entire Middle East crisis. From this view it may be desirable *per se* to have U.N. organs aid in the administration of any new agreement. Certainly, the interest of most free nations in maintaining order in the world community will create much pressure for permanent settlement of the dispute. This force may profitably be channeled in part through U.N. institutions.⁶⁰

BASES FOR NEGOTIATION: THE SIX PRINCIPLES

A number of plans for permanent resolution of the Suez Canal problem have been devised by different groups,⁶¹ but as yet agreement among the parties has been limited to six general principles⁶² designed to guide further negotiations. President Nasser's recent unilateral promulgation of a formula for governing canal affairs⁶³ impliedly rejects some of these

60. Of course, there are groups whose interests are opposed to those already mentioned, *e.g.*, competitors of those relying on the canal, and countries such as the U.S.S.R. which might benefit from economic embarrassment of national rivals as well as from general political unrest in the Middle East.

61. See, *e.g.*, the proposal resulting from the First London Conference of users, see text and citations at note 35 *supra*; the compromise proposed by India, N.Y. Times, Oct. 17, 1956, p. 2, cols. 3-5, N.Y. Times, Oct. 20, 1956, p. 8, col. 1; the separate proposals for international operation advanced by a special committee of the Council of Europe, N.Y. Times, Oct. 18, 1956, p. 12, col. 2 and by the American Association for the United Nations, open letter from Mrs. Franklin D. Roosevelt, Chairman, Board of Governors, Sept. 26, 1956.

62. See text at note 44 *supra*.

63. N.Y. Times, March 29, 1957, p. 2, cols. 4-8. The Nasser government has failed to take a consistent stand on the six principles. It was reported that President Nasser recently told King Saud of Saudi Arabia that the prior agreement on the six principles was "washed out" with the British-French invasion. N.Y. Times, March 1, 1957, p. 1, col. 7. This statement probably surprised many observers, for shortly after

principles. No doubt this pronouncement as well as other proposals will be considered in terms of the six principles. Hence suggestions will herein be oriented to those principles. Prior legal controls will be explored to aid evaluation of alternate modes of further defining these general propositions. The six principles are:

- "(1) there should be free and open transit through the Canal without discrimination, overt or covert—this covers both political and technical aspects;
- (2) the sovereignty of Egypt should be respected;
- (3) the operation of the Canal should be insulated from the politics of any country;
- (4) the manner of fixing tolls and charges should be decided by agreement between Egypt and the users;
- (5) a fair proportion of the dues should be allotted to development;
- (6) in case of disputes, unresolved affairs between the Suez Canal Company and the Egyptian Government should be settled by arbitration with suitable terms of reference and suitable provisions for the payment of sums found to be due."⁶⁴

I. FREE AND OPEN TRANSIT WITHOUT DISCRIMINATION

Right of Passage When the Riparian Power Is at Peace

The first principle enumerated reflects the primary interest of the users in the interrelated guarantees of free passage for, and equal treatment of, all ships, and is in its general form declaratory of existing international law. Once the high seas were freed for international navigation,⁶⁵ the same liberating influence produced the right of "innocent passage" through internationally strategic straits located wholly within territorial waters.⁶⁶ A general right of free passage through inter-oceanic canals for vessels of war and commerce, during peace and war, conditional upon the flag state and any state served by the vessel being at peace with the riparian state, has now become well established in international law through treaty,⁶⁷

the withdrawal of the last Anglo-French invasion forces, Egypt expressed a willingness to continue to adhere to the six general principles in any negotiation on the Suez Canal, N.Y. Times, Dec. 27, 1956, p. 1, col. 7, and Secretary of State Dulles recently indicated reliance on the agreement, N.Y. Times, Feb. 20, 1957, p. 8, col. 6. However, it has recently been reported that President Nasser is willing to settle all aspects of the Suez Canal dispute, save that of passage for Israeli shipping, according to the six principles. N.Y. Times, March 16, 1957, p. 1, col. 8.

64. 35 DEP'T STATE BULL. 616 (1956), N.Y. Times, Oct. 13, 1956, p. 1, col. 8.

65. See 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 653-54 (1941); OGLIVIE, INTERNATIONAL WATERWAYS c. 6 (1920); POTTER, FREEDOM OF THE SEAS (1924); Lawrence, *The Suez Canal in International Law*, in MODERN INTERNATIONAL LAW 37, 40-41 (1884).

66. Corfu Channel Case, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4; International Law Commission, Report, U.N. GENERAL ASSEMBLY OFF. REC., 11th Sess., Supp. No. 9, at 18-23 (Doc. No. A/3159) (1956); 1 BRÜEL, INTERNATIONAL STRAITS 98-112 (1947); Lawrence, *supra* note 65, at 41-42.

67. See Constantinople Convention art. I; Hay-Pauncefote Treaty art. II, § 1; Treaty of Versailles art. 380.

custom,⁶⁸ judicial decision⁶⁹ and endorsement by publicists.⁷⁰ The creation of such a user right marks perhaps the most recent stage in the gradual emancipation of international navigation from control of the individual national sovereign.⁷¹

Free passage for merchantmen⁷² follows from the fact that the canals were built primarily for the promotion of commercial traffic and the benefit of nearly all trading countries, and no other ships present less of a risk to either the canal or the security of the territorial sovereign than do trading ships. Even though the merchant ship is laden with contraband destined for a warring nation, its use of the "international" canal is not incompatible with the neutrality of the riparian sovereign.⁷³

Warships,⁷⁴ however, present a greater danger to the safe passage of other ships and to the security of the territorial sovereign. Yet, when warships of belligerent powers are separated and closely regulated, such dangers are satisfactorily minimized. A general international right of free passage for belligerent warships has been created by custom through conformity with the universal treaty law allowing passage of such vessels.⁷⁵ Indeed, prior to the Constantinople Convention, belligerent warships passed through the Suez Canal during the Franco-Prussian War of 1870-1871,⁷⁶ and this practice was approved at the 1873 Tonnage Conference.⁷⁷ In 1898, after the convention was ratified, Great Britain expressly interpreted the convention as allowing free access to all ships of both belligerents in the Spanish-American War.⁷⁸ During the Russo-Japanese War of 1904-1905, armed Russian vessels freely passed through the Suez Canal in both directions though operating against Japan, then an ally of Great Britain,

68. See Baxter, *Passage of Ships Through International Waterways in Time of War*, 31 BRIT. Y.B. INT'L L. 187, 192, 196-98, 200, 215 (1956); cf. *id.* at 192-96, 199-200 (practice in international straits).

69. Case of the S.S. "Wimbledon," P.C.I.J., Ser. A, No. 1 (1923).

70. See, e.g., FENWICK, *INTERNATIONAL LAW* 399, 401 (3d ed. 1948).

71. However, the canal must first be built and used for some time before the sovereign of strategic territory must yield to the international community. *Id.* at 402; Baxter, *supra* note 68, at 191; Lawrence, *supra* note 65, at 47.

72. See Baxter, *supra* note 68, at 209, 215; cf. Montreux Convention, July 20, 1936, art. II, 173 L.N.T.S. 213, 219 (hereinafter cited as Montreux Convention); 1 BRÜEL, *INTERNATIONAL STRAITS* 101-05 (1947); *The Closing and Reopening of the Dardanelles*, 6 AM. J. INT'L L. 706, 707 (1912).

73. See Case of the S.S. "Wimbledon," P.C.I.J., Ser. A, No. 1 (1923).

74. The problem of classifying ships as either vessels of commerce or war is thoroughly discussed in Baxter, *supra* note 68, at 210-13. However, under a new convention, as proposed herein, such a distinction is fundamentally unnecessary. See *id.* at 213. Where the classification may prove useful, such as in the imposition of special restrictions on vessels in transit for the protection of other shipping and the security of the local sovereign, it would be wise to follow Professor Baxter's suggestion that "warships and all types of auxiliary vessels should be defined in a broad sense as ships operating under public control for hostile or military purposes." *Ibid.*

75. See *id.* at 192-200, 215; cf. *id.* at 192-96 (practice in international straits).

76. Hoskins, *The Suez Canal as an International Waterway*, 37 AM. J. INT'L L. 373, 374 (1943).

77. WILSON, *THE SUEZ CANAL* 90 (1933).

78. 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 824 (1941).

the power in control of the canal.⁷⁹ Again, in 1911, free and equal access was afforded both belligerents in the Turko-Italian War.⁸⁰ Similarly, by presidential proclamation,⁸¹ the Panama Canal remained open⁸² to the passage of belligerent warships during each period of United States neutrality immediately preceding its entry into both World War I and II.⁸³

Right of Passage When the Riparian Power Is at War

When the flag state is not at peace with the riparian state, however, by custom even merchant ships of the former have no general right of passage.⁸⁴ Only the Constantinople Convention has attempted, and it unsuccessfully, to expressly guarantee free passage to all ships at all times.⁸⁵ On the other hand, the universal practice of barring enemy ships from passage has been justified with respect to the Kiel and Panama canals through the Treaty of Versailles and the Hay-Pauncefote Treaty, respectively. Article 380 of the Treaty of Versailles expressly limited the right of passage through the Kiel Canal to ships of nations "at peace with Germany."⁸⁶ In article III of the Hay-Pauncefote Treaty, concluded between the United States and Great Britain but since observed by all other user countries,⁸⁷ the United States agreed to render the Panama Canal "free and open to the vessels of commerce and of war of all nations." The United States has consistently interpreted this clause as allowing closure of the canal to ships of its enemies.⁸⁸ This construction seems reasonable when it is observed that the Constantinople Convention's rules for passage of belligerents were fully considered and in large part expressly adopted by the negotiators of the Hay-Pauncefote Treaty,⁸⁹ so that the omission of an explicit provision allowing passage for ships of nations at war with the United States was probably intentional.⁹⁰ In any event, no government has challenged this interpretation.

79. Hoskins, *supra* note 76, at 377-78.

80. *Id.* at 378.

81. 38 STAT. 2039 (1914); 4 FED. REG. 3821 (1939); cf. 2 BRÜEL, INTERNATIONAL STRAITS 104-08 (1947) (unilateral Danish and Swedish neutrality rules regulating the Danish Straits).

82. FENWICK, INTERNATIONAL LAW 401 (3d ed. 1948); PADEFORD, THE PANAMA CANAL IN PEACE AND WAR 130-31, 181 (1943). But cf. 2 BRÜEL, INTERNATIONAL STRAITS 62-71 (1947) (the laying of mines by neutral Denmark to close the Danish Straits to belligerent warships during World War I).

83. But see Protocol of an Agreement Relating to Neutrality, Oct. 10, 1914, 38 STAT. 2042, T.S. No. 597, reaffirmed Aug. 25, 1939, 54 STAT. 1811, E.A.S. No. 160. See generally 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 772-814 (1941).

84. See Baxter, *supra* note 68, at 204-05.

85. Constantinople Convention arts. I, IV, XI.

86. Cf. Montreux Convention arts. XX, XXI.

87. For general discussion of user rights under treaty law, see note 9 *supra*; under customary international law, see note 10 *supra*.

88. See text at notes 91, 92 *infra*.

89. Hay-Pauncefote Treaty art. III; see text at notes 133-38 *infra*.

90. See Knapp, *The Real Status of the Panama Canal as Regards Neutralization*, 4 AM. J. INT'L L. 314, 321 (1910). But see Kennedy, *Neutralization and Equal Terms*, 7 AM. J. INT'L L. 27, 35-36 (1913).

The negative implication of article 380 of the Treaty of Versailles, that vessels of nations at war with the riparian sovereign need not be granted passage, accurately reflects the practice in all international canals. During the first world war the United States issued orders denying passage through the Panama Canal to enemy ships,⁹¹ and permanent regulations have continued the same proscription.⁹² Although it has been said that in World War I the British allowed passage through the Suez Canal for German ships,⁹³ none dared attempt entry during World War II.⁹⁴ The recent restrictions imposed by Egypt on Israeli shipping,⁹⁵ in violation of the Constantinople Convention,⁹⁶ provide further evidence that, regardless of treaty commitment, whenever one country is in control of an inter-oceanic canal it will bar passage to all ships which in its view present a serious military threat to it.

Insistence that the territorial sovereign permit the vessels of a nation with which it is at war to pass freely through its canal is unrealistic. The presence of such ships endangers not only the canal, which would be a significant target for an enemy, but also the territory of the sovereign. Furthermore, permitting an enemy to benefit from use of a vital water route involves an unknown concept of the rules of war. Even the Treaty of Versailles, which was imposed on a defeated country, recognized the futility of requiring the Kiel Canal to be opened to nations at war with Germany. Therefore, the First London Conference's proposal,⁹⁷ which would continue the Constantinople Convention guarantee of free passage to all ships at all times, seems unworkable unless coupled with permission to exclude vessels of Egypt's enemies during time of war.

Though the riparian state be at war, neutral ships, both merchant vessels and warships, have a general right of passage similar to that available when the riparian power is at peace.⁹⁸ Even when a neutral vessel is being used to aid a declared enemy of the territorial power, treaties

91. 40 STAT. 1667 (1917).

92. 35 C.F.R. § 4.176 (1949); cf. 2 BRÜEL, INTERNATIONAL STRAITS 108 (1947) (absence of Danish or Swedish guarantees for passage through the Danish Straits when either is belligerent).

93. LAWYERS COMMITTEE ON BLOCKADES, THE UNITED NATIONS AND THE EGYPTIAN BLOCKADE OF THE SUEZ CANAL 10 (1953).

94. *Id.* at 11; cf. 2 BRÜEL, INTERNATIONAL STRAITS 174 (1947) (allied control of the Straits of Gibraltar during wartime); Baxter, *supra* note 68, at 203 (mining of the Danish Straits and their approaches during World War II).

95. See LAWYERS COMMITTEE ON BLOCKADES, *op. cit. supra* note 93, at 6-7; Dinitz, *The Legal Aspects of the Egyptian Blockade of the Suez Canal*, 45 GEO. L.J. 169 (1957); *The Security Council and the Suez Canal*, 1 INT'L & COMP. L.Q. 85 (1952). For citation to most relevant documents, see Baxter, *supra* note 68, at 187 n.2. In late 1954 world opinion was particularly aroused when the Israeli freighter, *Bat Galim*, flying an Israeli flag and manned by an Israeli crew, was seized by Egypt off the southern terminus of the Suez Canal. See Dinitz, *supra* at 198; Selak, *The Suez Canal Base Agreement of 1954*, 49 AM. J. INT'L L. 487, 501-02 (1955).

96. Constantinople Convention arts. I, IV, XI. See, e.g., Dinitz, *supra* note 95, at 175-81; N.Y. Times, Oct. 15, 1956, p. 6, cols. 4-6. But see, e.g., The Suez Canal, Egyptian Embassy Press Release, Aug. 10, 1956, p. 14.

97. See note 35 *supra*.

98. See Baxter, *supra* note 68, at 205-08.

governing the Suez,⁹⁹ Panama¹⁰⁰ and Kiel¹⁰¹ canals apparently guarantee free passage.¹⁰² During the two world wars, the Constantinople Convention was formally satisfied by inspecting neutral vessels while in the canal zone and postponing confiscation of those aiding the enemy until the ships were beyond the three-mile limit.¹⁰³ However, since 1948 Egypt has searched neutral ships going through the Suez Canal and, in violation¹⁰⁴ of the Constantinople Convention,¹⁰⁵ has seized "contraband"¹⁰⁶ going to or coming from Israel. As long as the littoral sovereign is at war, this practice seems fair even if carried on within the canal zone.¹⁰⁷ Although the neutral ship presents no immediate danger to other ships in transit or to the security of the territorial power, since its cargo is eventually to be utilized in support of belligerent activities aimed at the latter it may properly be confiscated.

*Right of Passage When the Riparian Power Is in Imminent
Danger of Attack*

For a riparian power legitimately to exclude ships from the canal under the principles outlined above, a state of war must exist. Where a state of belligerency does clearly exist, it reflects a fundamental antagonism sufficient to justify closure. However, the determination of this condition is often difficult and "peace" may frequently be a most artificial designation. For example, once Egypt and Israel signed a "permanent"¹⁰⁸ armistice agreement in 1949, their subsequent relationship could not readily be categorized as either war or peace. Moreover, what rule is to govern during "police actions" or other limited activity such as the recent Anglo-French intervention? This difficulty can largely be resolved by realistically recognizing the right of the riparian power to close the canal to ships bearing the flag of, or acting in aid of, any nation with whom the riparian power is currently engaged in open hostilities of a substantial character.

A more difficult situation exists when large-scale fighting is absent but the littoral sovereign anticipates an immediate outbreak. A new rule¹⁰⁹

99. Constantinople Convention art. I.

100. Hay-Pauncefote Treaty art. III; Hay-Varilla Treaty art. XVIII.

101. Treaty of Versailles art. 380.

102. *But cf.* Montreux Convention art. V, XX.

103. For a general discussion, see Baxter, *supra* note 68, at 206-08.

104. See LAWYERS COMMITTEE ON BLOCKADES, *op. cit. supra* note 93, at 12; Dinitz, *supra* note 95, at 181.

105. Constantinople Convention arts. IV, XI.

106. For recent Egyptian regulations, see N.Y. Times, Oct. 9, 1956, p. 15, col. 1. For a decision approving confiscation in 1948 of armored cars from neutral ships, see *The Flying Trader*, Prize Court of Alexandria, Egypt, Dec. 2, 1950, [1950] Int'l L. Rep. 440 (Lauterpacht ed. 1956). In the summer of 1956 the Greek freighter, *Panagia*, enroute from one Israeli port to another, was barred from the canal. N.Y. Times, Oct. 14, 1956, § 1, p. 1, col. 7.

107. See Baxter, *supra* note 68, at 215.

108. See LAWYERS COMMITTEE ON BLOCKADES, *op. cit. supra* note 93, at 14-15; Dinitz, *supra* note 95, at 190.

109. If unqualified by article XI, article X of the Constantinople Convention may be construed to allow Egypt a very broad discretion in taking measures deemed neces-

is also necessary to govern adequately this penumbra. Perhaps the riparian power should be allowed to bar transit for ships bearing the flag of, or acting in aid of, any nation from whom the riparian power is in imminent danger of a substantial armed attack.¹¹⁰

In opposition to this proposal, it may be contended that war is not inevitable, that when ill feelings exist between nations the law should countenance only such conduct by the parties as is conducive to friendly relations. Because of its economic and military consequences, canal closure is certain to increase tension, perhaps to the point of precipitating the feared attack by the excluded state. Accordingly, closure of the canal, rather than being a defensive measure for the riparian power, could inspire active hostilities.

It may nevertheless be considered unfair to require a nation to permit a canal passing through its territory to be used for the economic and military advantage of a nation about to attack the territorial sovereign. Aside from the reasonableness of such a requirement, it seems unrealistic to expect the sovereign to assist in the build-up of another to its own danger or destruction. Since enforcement of international law is quite unpredictable, even when sanctions are available, it would seem particularly unwise to press here for an ideal rule that is certain to be broken. Significantly, there is every reason to believe that Egypt will not accept a new Suez Canal convention unless it is given the right to exclude Israel from use of the canal in some situations short of full-scale hostilities.

Protection from abuse requires a rapid, compulsory adjudication of whether the measures taken by Egypt in any circumstance are justified. It would seem that an adequate procedure is available within the present framework of the United Nations Charter. Article 51 reserves the "inherent right of individual . . . self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Although under a literal reading of article 51 the reserved right would be unavailable in the absence of an "armed attack," this qualification will probably be liberally construed to allow defensive action under an imminent threat of attack.¹¹¹ Therefore, if Egypt deemed closure necessary for purposes of self-defense, such action would initially be consistent with the United Nations Charter.

But article 51 then requires that "measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council. . . ." If the Security Council, considering an Egyptian

sary for its self-defense. Abuse is courted by such broad phraseology. A minimal limitation is necessary to prohibit a complete obstruction of the canal to all traffic, no matter how compelling the circumstances.

110. Cf. Montreux Convention arts. VI, XXI.

111. In 1951, during Security Council debate preceding adoption of the resolution condemning Egyptian restrictions on Israeli shipping, the situation of an imminent threat of attack on Egypt, as well as that of actual armed attack, was expressly distinguished. See U.N. SECURITY COUNCIL OFF. REC., 6th year, 550th meeting 8, 20 (1951); *id.* 552d meeting 3, 13.

petition, found that Egypt's enemy posed a "threat to the peace,"¹¹² Egypt could legitimately continue to bar ships belonging to, or acting in aid of, the violating nation. The Security Council decision would in fact be a determination of whether or not Egypt was in imminent danger of attack, yet would employ a more familiar standard already agreed upon.¹¹³ In effect, then, closure would also act as a sanction for enforcement of the resolution condemning the nation threatening attack. Of course, even when Egypt is not the petitioner, under article 41 the Security Council theoretically could "call upon" Egypt to close the canal as a U.N. sanction short of the use of force. The imposition of such a burden on Egypt, however, might be totally unacceptable to that country¹¹⁴ and hence limit the probable usefulness of such action as a sanction.

If the Security Council were to reject an Egyptian resolution condemning the posture of Egypt's alleged enemy as presenting a "threat to the peace," Egypt would then be under a duty to open the canal. Indeed, if closure were continued, the Security Council could find that such action in itself constituted a "threat to the peace," as in 1951.¹¹⁵ It would seem that the ultimate obstacle to a peaceful ordering of canal activities lies, as it did in 1951, in securing adequate pressure for compliance when the country adversely affected by closure is small and without a ready ally. Yet the recent Israeli withdrawal from the Gaza strip and positions bordering the Straits of Tiran was apparently based on the belief that just such pressure would be forthcoming.¹¹⁶ Article 41 would also authorize the Security Council to order payment of canal tolls to a neutral body, and to take other economic measures, in order to enforce any resolution against Egypt.^{116a} Although exercise of the veto power prevented reaffirmation in 1954^{116b} of the 1951 Security Council resolution, and may bar similar action in the future, it would nevertheless seem wise to continue to act within the present U. N. structure, for the Security Council is the only supra-national body authorized to employ such sanctions.

Further Restrictions on the Right of Passage

"Neutralization" Provisions

In addition to proclaiming a general right of free passage through inter-oceanic canals, treaties outline correlative duties of the signatory

112. Pursuant to U.N. CHARTER art. 39.

113. Cf. Montreux Convention art. XXI, which provided comparable review by the Council of the League of Nations and the signatories to the convention of Turkish activity in the straits under a standard of imminence of war.

114. See Baxter, *supra* note 68, at 210.

115. U.N. SECURITY COUNCIL OFF. REC., 6th year, 558th meeting 2 (1951).

116. It might also be possible, if Egypt were to agree, to utilize U.N. toll collection as a lever to enforce Egyptian compliance. See text at notes 189-91 *infra*.

116a. Cf. Text at note 189 *infra*.

116b. U.N. SECURITY COUNCIL OFF. REC., 9th year, 664th Meeting 12 (1954).

nations deemed necessary to protect such rights. Through customary adherence thereto, many such limitations may now be reasonably implied in the phrase "free and open passage."¹¹⁷ The proscription of activities designed to obstruct passage is obvious and basic.¹¹⁸ In order to reduce the risk of damage to, or obstruction of, innocent shipping, hostile or belligerent acts are prohibited within the canal zones, even though not intended to block traffic.¹¹⁹ Such restrictions have frequently been termed "neutralization" of the area.¹²⁰

A mutual agreement to refrain from hostilities can be effective only when the power controlling the canal is not a belligerent. It would be unrealistic in wartime to expect a convention provision to deter the enemy of the territorial sovereign from attacking one of the latter's most strategic zones in order to protect neutral shipping.¹²¹ Though a signatory to the Constantinople Convention, Germany did not refrain from bombing the canal during World War II.¹²² More recently, Britain and France, even without a declaration of war, bombed and invaded the Suez Canal zone, thus violating the Constantinople Convention "neutralization" provisions despite the alleged Anglo-French purpose of protecting passage through the canal.¹²³ Although the efficacy of any restriction on hostilities must seriously be questioned in light of the aforementioned events, such a rule probably has a deterrent force sufficient to justify its retention.

Fortifications

While the Constantinople Convention of 1888 expressly prohibited Suez Canal fortifications¹²⁴ without employing the term "neutralization," in contrast the Hay-Pauncefote Treaty purportedly "neutralized" the

117. See Baxter, *supra* note 68, at 215.

118. Constantinople Convention arts. I, IV; Hay-Pauncefote Treaty art. III, § 2.

119. Constantinople Convention art. IV; Hay-Pauncefote Treaty art. III, § 2; *cf.* Montreux Convention art. XIX. When the British seized the Suez Canal in 1882 to prevent its capture or destruction by the revolutionaries, traffic ceased for twenty-four hours. Lawrence, *The Suez Canal in International Law*, in *MODERN INTERNATIONAL LAW* 37, 47 (1884). The recent Anglo-French intervention in the Suez Canal zone, though allegedly designed to protect passage, led to total obstruction for a period of months.

120. BRIERLY, *THE LAW OF NATIONS* 192 (4th ed. 1949); Hains, *Neutralization of the Panama Canal*, 3 *AM. J. INT'L L.* 354 (1909); Kennedy, *supra* note 90; Knapp, *supra* note 90.

121. See Lawrence, *supra* note 119, at 56-57.

122. See SCHONFIELD, *THE SUEZ CANAL IN WORLD AFFAIRS* 103-08 (1953); Baxter, *supra* note 68, at 204.

123. Addresses by Prime Minister Eden and Premier Mollet, Oct. 30, 1956, *N.Y. Times*, Oct. 31, 1956, p. 16, cols. 4-7; Statement by Sir Pierson Dixon before the United Nations Security Council, Oct. 31, 1956, *N.Y. Times*, Nov. 1, 1956, p. 16, cols. 4-6.

124. Constantinople Convention art. XI; *cf.* Declaration Between the United Kingdom and France Respecting Egypt and Morocco, April 8, 1904, art. VII, 1 *AM. J. INT'L L.* 6, 8 (Supp. 1907) (prohibition against the erection of "fortifications or strategic works" on a portion of the Moorish coast bordering the Straits of Gibraltar), discussed in 2 BRÜEL, *INTERNATIONAL STRAITS* 152-56 (1947).

Panama Canal¹²⁵ without mentioning fortifications.¹²⁶ During completion of the Panama Canal a major controversy¹²⁷ raged over whether the Hay-Pauncefote Treaty, by expressly "neutralizing" the canal, though remaining silent on fortifications, nevertheless barred the United States from fortifying the Panama Canal Zone. The question has been largely academic, however, because the Canal Zone was fortified with the acquiescence of the British Foreign Office¹²⁸ and has remained fortified ever since without challenge from other users.¹²⁹

Restraining the territorial sovereign from fortifying the canal area would in fact be a disservice to user countries at peace with the territorial sovereign. The presence of fortifications could deter an enemy attack that may otherwise be aimed at the artery. Furthermore, their purpose would be wholly defensive, preserving free passage for ships of neutrals, the littoral sovereign and its allies. Those opposed to fortifications contend that they offer an incentive for attack on the canal that otherwise would not exist.¹³⁰ This argument assumes that in the absence of fortifications an enemy of the territorial sovereign would refrain from attempting to seize, damage or obstruct a waterway of immense strategic value to the controlling power. Such a view seems totally unrealistic, especially in light of past practices of those bound by treaty to refrain from hostilities in such areas.¹³¹

Limitations on Warship Activity

Treaties have also regulated the passage of belligerent warships¹³² to prevent movements which could be preparatory to violation of the general proscriptions outlined above. For example, provisions in both the Constantinople Convention and the Hay-Pauncefote Treaty require belligerent warships to complete transit in twenty-four hours,¹³³ with the least possible

125. Hay-Pauncefote Treaty preamble, art. III. See also Hay-Varilla Treaty art. XVIII (agreement between the United States and Panama that the canal and its entrances would be "neutral in perpetuity" and opened in conformity to stipulations of the Hay-Pauncefote Treaty); cf. Treaty Between Argentine Republic and Chile, Establishing the Neutrality of Straits of Magellan, July 23, 1881, art. V, 3 AM. J. INT'L L. 121, 122 (Supp. 1909) (attempt to "insure . . . neutrality" by prohibiting fortifications).

126. Fortifications were expressly prohibited in the Treaty Between the United States of America and Her Britannic Majesty (Clayton-Bulwer Treaty), April 19, 1850, art. I, 9 STAT. 995, T.S. No. 122. This treaty was expressly superseded by the Hay-Pauncefote Treaty pursuant to article I thereof.

127. See, e.g., OPPENHEIM, *THE PANAMA CANAL CONFLICT* 22 (1913); Hains, *supra* note 120; Olney, *Fortification of the Panama Canal*, 5 AM. J. INT'L L. 298 (1911).

128. See 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 791 (1941). See generally *id.* at 791-97.

129. Since the canal has always been fortified, and since all nations other than Great Britain, Panama and the United States have obtained user rights solely through the establishment of custom, see notes 9, 10 *supra*, such user nations could not justifiably challenge such fortifications.

130. See Kennedy, *The Canal Fortifications and the Treaty*, 5 AM. J. INT'L L. 620, 622-25 (1911).

131. See text at notes 122, 123 *supra*.

132. For the problem of classifying vessels, see note 74 *supra*.

133. Constantinople Convention art. IV; Hay-Pauncefote Treaty art. III, § 5.

delay¹³⁴ and without unnecessary stops to revictual,¹³⁵ to take on stores,¹³⁶ or to embark or disembark troops or war materiel.¹³⁷ Moreover, to prevent friction between belligerent warships from damaging the canal facilities or otherwise obstructing passage for other ships, "an interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile power."¹³⁸ Finally, with respect to the Suez Canal, belligerents are not accorded the treaty privilege of stationing two warships in the access ports of Port Said and Suez.¹³⁹ These regulations seem fair and, with a few modernizations,¹⁴⁰ should be made part of any new convention.

In addition to treaty provisions regarding belligerent warships, more restrictive regulations have been unilaterally issued by the canal operators.¹⁴¹ Most of these regulations are probably justified as reasonable adaptations of more generalized treaty provisions to current conditions, but to avoid dispute over the treaty's scope those regulations deemed worthwhile should be expressly incorporated into the new Suez convention. For example, Panama Canal regulations deny passage unless written assurance of compliance with canal regulations is received by the canal authorities from the captain of a belligerent warship applying for entry.¹⁴² Furthermore, a very strict limit has been unilaterally placed on fuel and lubricant intake,¹⁴³ on use of repair facilities and docks,¹⁴⁴ on use of radio installations on belligerent vessels,¹⁴⁵ on activity of belligerent aircraft¹⁴⁶ and on the number of warships of any one nation and its allies, belligerent or not, that may be in the canal system at any one time.¹⁴⁷ In addition, all ships desiring passage must submit to many lesser regulations designed to protect all shipping from unintentional obstruction, delay or other inconvenience.¹⁴⁸

134. Constantinople Convention art. IV; Hay-Pauncefote Treaty art. III, § 3; *cf.* Montreux Convention art. XVI.

135. Constantinople Convention art. IV; Hay-Pauncefote Treaty art. III, § 3.

136. *Ibid.*

137. Constantinople Convention art. V; Hay-Pauncefote Treaty art. III, § 4.

138. Constantinople Convention art. IV; see Hay-Pauncefote Treaty art. III, § 5.

139. Constantinople Convention art. VII.

140. See, *e.g.*, unilateral regulations cited at notes 142-48 *infra*.

141. Congress has empowered the President to promulgate regulations governing the Panama Canal. C.Z. CODE tit. 2, § 9 (1934).

142. 35 C.F.R. § 4.164 (1949).

143. *Id.* §§ 4.166-68.

144. *Id.* § 4.172.

145. *Id.* § 4.173.

146. *Id.* § 4.174; *cf.* Montreux Convention art. IV.

147. There shall be no more than "three in either terminal port and its adjacent terminal waters, or than three in transit through the Canal; nor shall the total number of such vessels, at any one time, exceed six in all the territorial waters of the Canal Zone . . ." 35 C.F.R. § 4.171 (1949). The section title refers only to belligerent vessels, but the text is not similarly qualified.

148. See *id.* §§ 4.1-160. See also UNIVERSAL SUEZ MARITIME CANAL COMPANY, RULES OF NAVIGATION (1953).

Equal Treatment

All international treaties governing inter-oceanic canals rightly guarantee equal access to ships of all nations.¹⁴⁹ Nevertheless, a state may attempt to rationalize apparently discriminatory behavior by unilateral interpretation and application of other treaty provisions. For example, Egypt has interpreted the Constantinople Convention as allowing her the right to bar passage to enemy ships and those carrying cargo which may aid her enemy.¹⁵⁰ She has further determined that Israel fits the category of enemy,¹⁵¹ in spite of an existing armistice agreement.¹⁵² The danger of discrimination from this source is due not only to ambiguous and perhaps unrealistic treaty clauses, but also to the failure of the treaty to provide for compulsory adjudication by an impartial tribunal, with assured enforcement of resultant decisions.

Another form of discrimination exists in the case of the Panama Canal. Although the Hay-Pauncefote Treaty's regulation of belligerent warship activities creates no specific exception for ships of the United States, this country has by executive order exempted its warships from such restrictions.¹⁵³ Such an exemption is justified if it is conceded that the treaty does not attempt to regulate belligerent activities of the United States,¹⁵⁴ an argument similar to that made with regard to the right of the United States to exclude ships belonging to its enemies.¹⁵⁵ This problem, however, like that of fortifications,¹⁵⁶ is probably academic since the British early stated that they "do not question its [United States'] title to exercise belligerent rights for its protection."¹⁵⁷

149. "The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag," Constantinople Convention art. I. See also *id.* art. XII. "The [Panama] canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise." Hay-Pauncefote Treaty art. III, § 1; see Versailles Treaty arts. 380, 381; *cf.* Barcelona Statute on Freedom of Transit, April 20, 1921, arts. II, III, 7 L.N.T.S. 27 (hereinafter cited as Barcelona Statute); Montreux Convention arts. II, IV, X. *But cf. id.* preamble, arts. XI, XII, XVIII (special protection afforded Black Sea powers through regulation of the Turkish Straits). A German court has held that the Versailles Treaty, in providing for equal use of the Kiel Canal, did not thereby require Germany to provide equal access to its courts to governments seeking redress for damage to vessels caused by negligent acts of canal pilots employed by the German government. The Cumene, Reichsgericht, Oct. 13, 1925, [1925-1926] ANN. DIG. PUB. INT'L L. CAS. 128 (McNair & Lauterpacht eds. 1929).

150. See, *e.g.*, The Suez Canal, Egyptian Embassy Press Release, Aug. 10, 1956, p. 14.

151. *Ibid.*

152. Egyptian-Israeli General Armistice Agreement, Feb. 24, 1949, 42 L.N.T.S. 251.

153. 35 C.F.R. §§ 4.64-74 (1949).

154. *But see* OPPENHEIM, THE PANAMA CANAL CONFLICT 18 (1913), wherein the author contends that "neutralization" of the canal necessarily means that the United States is equally bound to obey the article III provisions governing belligerent activities and movements of belligerent warships.

155. See text at notes 88-90 *supra*.

156. See text at note 128 *supra*.

157. 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 797 (1941).

However, there is at least one act of Congress now in effect which clearly seems to violate the non-discrimination clause of the Hay-Pauncefote Treaty. This is a statute which expressly bars passage through the Panama Canal to ships owned, chartered, operated or controlled by violators of the federal anti-trust laws.¹⁵⁸ Apparently an attempt to bolster enforcement of the anti-trust laws against foreign concerns, this statute is nevertheless inconsistent with both the letter of the treaty¹⁵⁹ and the concept of the canal as an international waterway. To forestall the possibility that international canals will be utilized to enforce unrelated national legislation, the canal convention should expressly prohibit the application of such laws.

Manipulation of canal tolls can be a particularly effective means of discrimination, quite separate from outright obstruction of access or "covert" harassment during passage. The Hay-Pauncefote Treaty expressly deals with this problem by requiring non-discriminatory charges.¹⁶⁰ A general guarantee of equal treatment in the Constantinople Convention serves the same purpose.¹⁶¹ Typical of the sort of abuse that may arise are several incidents involving the Panama Canal. Originally, the Panama Canal Act¹⁶² made the canal toll-free to all United States ships engaged in United States coastal trade. The British immediately protested, and Congress subsequently repealed the contested provision.¹⁶³ Furthermore, in compliance with treaties with Panama¹⁶⁴ and Colombia,¹⁶⁵ current legislation¹⁶⁶ exempts vessels of the Republics of Panama and Colombia

158. 37 STAT. 567 (1912), 15 U.S.C. § 31 (1952).

159. Hay-Pauncefote Treaty art. III, § 1.

160. *Ibid.*; cf. Barcelona Statute art. III; Montreux Convention annex I. Oppenheim also thought the words "just and equitable" required that "every vessel which uses the Canal shall bear a proportionate part of such cost." OPPENHEIM, *THE PANAMA CANAL CONFLICT* 30 (1913).

161. Constantinople Convention arts. I, XII.

162. Act of Aug. 24, 1912, c. 390, § 5, 37 STAT. 562.

163. Act of June 15, 1914, c. 106, § 1, 38 STAT. 385. See *The Repeal of the Provision of the Panama Canal Act Exempting American Coastwise Vessels From the Payment of Tolls*, 8 AM. J. INT'L L. 592 (1914). For much of the debates, see 1912 FOREIGN REL. U.S. 467-89 (1919); 1913 FOREIGN REL. U.S. 540-49 (1920). President Taft contended that the Hay-Pauncefote Treaty merely granted to foreign nations the use of the canal under a conditional most-favored-nation clause. Memorandum from the President to Congress, 1912 FOREIGN REL. U.S. 475, 476 (1919). *Contra*, OPPENHEIM, *THE PANAMA CANAL CONFLICT* 12 (1913): "Since she did not own the Canal territory and had not made the Canal at the time when she agreed with Great Britain upon the Hay-Pauncefote Treaty, she ought not to maintain that she granted to foreign nations the privilege of using *her* Canal under a conditional most-favored-nation clause . . ."; Latané, *The Panama Canal Act and the British Protest*, 7 AM. J. INT'L L. 17 (1913); Wambaugh, *Exemption From Panama Tolls*, 7 AM. J. INT'L L. 233 (1913). Repeal was strongly urged by President Wilson in an address delivered at a joint session of the two Houses of Congress, March 5, 1914, 1914 FOREIGN REL. U. S. 317 (1922), and by Senator Root, ROOT, ADDRESSES ON INTERNATIONAL SUBJECTS 207-312 (1916). See generally 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 772-80 (1941).

164. Hay-Varilla Treaty art. XIX.

165. Treaty for the Settlement of Differences Arising Out of Events Which Took Place on the Isthmus of Panama in November, 1903, April 6, 1914, 42 STAT. 2122, T.S. No. 661.

166. C.Z. CODE tit. 2, § 412 (Supp. 1943).

from payment of Panama Canal tolls. The British objected to this also,¹⁶⁷ but later acquiesced¹⁶⁸ when the United States explained that such a concession was necessary to secure full rights over the canal zone and assured Great Britain that such an extraordinary measure would not be utilized in the future.¹⁶⁹ Lacking a contrary provision in the governing treaty, the operating power may attempt to utilize its control over canal tolls either in promoting its national commercial interests or as a lever in bargaining with other nations. To prevent abuses arising from unilateral interpretation of the concept of equal treatment, those negotiating the new convention should deal with the aforementioned questionable activities and embody decisions as to each in the agreement.

II. SOVEREIGNTY OF THE TERRITORIAL POWER

It has been suggested that the world community has acquired user rights through the Suez Canal by long usage under a multilateral convention.¹⁷⁰ Moreover, it may be contended that the world economy has been patterned largely in reliance on the Suez Canal as a free and open channel operated by an organization of international character.¹⁷¹ If this view is accepted, the original and apparently unchanged desire of the user nations to have the canal operated by an international body does not contravene the second agreed principle—respect for the sovereignty of Egypt—even though this principle be construed to mean that Egypt's sovereignty should be left unimpaired.

In opposition, Egypt would point out that the canal was originally carved from, and currently passes through, Egyptian soil; that the rights enjoyed by users were originally obtained through Egyptian consent and hence should be strictly construed. Furthermore, there is no precedent in international law requiring the sovereign to relinquish its right to control operation in favor of some international body. The Universal Suez Canal Company, though possessing some international characteristics, received its authority to operate the canal solely through concessions from the Khedive. In addition, the other two canals of major international significance have always been operated by subsidiary governmental organs of the riparian power. Therefore, the Suez Canal may be said to be dedicated to the world community only with respect to a right of free and equal transit, yet under the limitations customarily imposed by all powers

167. The original clause which evoked the protest had first been inserted in the abortive 1909 treaty with Colombia. See 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 775 (1941).

168. *Id.* at 778-79.

169. *Id.* at 775-78.

170. See Baxter, *Passage of Ships Through International Waterways in Time of War*, 31 *BRIT. Y.B. INT'L L.* 187 (1956).

171. While rejecting Western arguments that the Constantinople Convention or the unique status of the company or the canal prohibited cancellation of the canal concession, one author has at least recognized that such reliance should be accorded serious consideration. Note, *Nationalization of the Suez Canal Company*, 70 *HARV. L. REV.* 480, 482-85 (1957).

controlling similar international waterways. The existing customary right to free and equal passage suggests that international operation is not necessary to secure this right for the users.

Recognizing that the Security Council expressly rejected a requirement of international operation, and conceding that prior agreement does not infringe on the exercise of Egyptian sovereignty to control canal operation, the second principle still need not exclude the possibility of international operation. It is not inconsistent with "respect" for Egyptian sovereignty for that nation to agree to the creation of an international body to operate the canal. However, since this concept of "respect" merely involves recognition of Egypt as the territorial sovereign having interests that must be considered, the second principle would be virtually superfluous. It seems obvious that in negotiating with a nation now in possession of the waterway, its sovereignty will be accorded high respect.

Regardless of the advantages of international operation to most of the world, it appears certain that Egypt will continue to reject such a proposal. In a recent memorandum, Egypt has declared that the canal will be operated by an Egyptian Suez Canal Authority.^{171a} Accepting this view as the probable working premise, the users may do better to concentrate on incorporating in the convention adequate workable controls over Egyptian operation.¹⁷² With the Anglo-French-Israeli invasion fresh in the minds of all Egyptians, the users may find it very difficult to secure any restraints on Egyptian operation.

Aside from the question of what body is to be charged with canal operation, it seems clear that the second principle was intended to assure Egypt of the right to prescribe health and sanitation requirements, rules to protect Egyptian customs and immigration laws, and the application of its criminal laws. As to these matters, it seems certain Egypt will be allowed to exercise its sovereignty. Such rights have been reserved to the territorial power under present treaties otherwise "internationalizing" inter-oceanic canals. The Constantinople Convention reserved "the rights of Turkey as the territorial power"¹⁷³ and provided that the treaty stipulations should not "interfere with the sanitary measures in force in Egypt."¹⁷⁴ In the Hay-Pauncefote Treaty the British relinquished any interest in operating the prospective Panama Canal by allowing the United States the "exclusive rights of providing for the regulation and management of the canal,"¹⁷⁵ but under the guarantee that "conditions" of traffic be just and equitable as well as non-discriminatory against any nation.¹⁷⁶ Article 381 of the Versailles Treaty presents a model for pertinent international legislation. It provided, with respect to the Kiel Canal:

171a. N.Y. Times, March 29, 1957, p. 2, col. 6.

172. See text at notes 188-91 *infra*.

173. Constantinople Convention art. XII. Egypt was then under the suzerainty of Turkey, the actual convention signatory.

174. *Id.* art. XV.

175. Hay-Pauncefote Treaty art. II.

176. *Id.* art. III, § 1.

"No impediment shall be placed on the movement of persons or vessels other than those arising out of police, customs, sanitary, emigration or immigration regulations, and those relating to the import and export of prohibited goods and . . . such regulations must be reasonable and uniform and must not unnecessarily impede traffic."

At present, moreover, the United States Government promulgates a detailed set of such regulations for the Panama Canal Zone.¹⁷⁷ These incidental controls have long been tolerated because they are frequently of mutual benefit, and the resultant traffic restrictions are usually slight.

An additional "sovereign" right normally retained by the local power is that of "territorial" judicial jurisdiction over the canal waters, as well as over resident personnel and conduct on adjacent land. Local courts exercise jurisdiction over collisions occurring in canal zone waters,¹⁷⁸ and the principle of innocent passage has failed to prevent the civil arrest of vessels when within such waters.¹⁷⁹ Violation of a canal regulation is a criminal offense triable in local courts,¹⁸⁰ while criminal conduct aboard ship should probably be governed by the "peace of the port" doctrine. The convention should explicitly reserve to Egypt these and other "sovereign rights," but any right of civil arrest for prior causes of ships, passengers or crews making a through trip should be withdrawn, since peacetime user rights should exist independently of any disputes that are unrelated to the canal itself.¹⁸¹

III. INSULATION OF CANAL OPERATION FROM NATIONAL POLITICS

The third principle, requiring that operation of the canal be insulated from national politics, has been described as the key concession obtained from the Egyptians during the negotiations at the United Nations.¹⁸² That this is a real concession, however, seems doubtful. The first principle, in ensuring free and open passage without discrimination, appears to grant the same guarantee as the third. Although the language of the third principle can be construed as requiring international operation of the canal, it is unlikely that such meaning was intended, inasmuch as Egypt had adamantly continued to resist such a proposal¹⁸³ and a separate provision for international operation was expressly rejected by the Security Council when the six principles were adopted.¹⁸⁴

177. See, e.g., 35 C.F.R. §§ 6.1-11, 9.1-18, 10.1-59, 24.1-104, 30.1-5 (1949).

178. Kiel Canal Collision Case, German (British Zone) Supreme Court, [1950] Int'l L. Rep. 133 (Lauterpacht ed. 1956).

179. The "David," Am. & Panamanian Gen. Cl. Arb. 765, 812 (1934).

180. C.Z. CODE tit. 2, § 413 (Supp. 1943).

181. See Borchard, *The United States-Panama Claims Arbitration*, 29 AM. J. INT'L L. 99, 104-05 (1935).

182. See, e.g., Secretary of State Dulles' News Conference, Oct. 16, 1956, 35 DEPT STATE BULL. 655 (1956).

183. See, e.g., remarks by Foreign Minister Mahmoud Fawzi, Nov. 25, 1956, N.Y. Times, Nov. 26, 1956, p. 6, col. 3.

184. See text at notes 47, 48 *supra*.

It seems clear that the clause was intended to provide some device, short of the use of force, international operation of the canal¹⁸⁵ or removal of Egyptian sovereignty over the canal zone,¹⁸⁶ for preventing or correcting unreasonable unilateral interpretations of whatever new convention may be signed, even assuming Egyptian operation. Any machinery set up for this purpose should be concerned not only with the "operation" of the canal but should extend to all activities within the canal zone. The necessity for such broad coverage is demonstrated by the fact that discriminatory treatment of Israeli ships and goods occurred before as well as after Egypt assumed operation of the canal from the nationalized Universal Suez Canal Company.¹⁸⁷

At the core of a workable control device is frequent review of Egyptian operation by an impartial, professional body, perhaps within the United Nations Secretariat, whose decisions would be subject to a limited judicial review by the International Court of Justice.¹⁸⁸ This commission, staffed with experts, could be authorized to examine periodically and pass upon proposed budgets, toll schedules, prospective improvement programs, financial reports and the efficacy of operations and development. All disputes arising under the new convention concerning matters other than those assigned to the commission could be made subject to compulsory arbitration by an impartial tribunal, with review by the International Court.

Once a final decision has been reached, sanctions must be available to enforce compliance, or little progress will have been made. Therefore, upon presentation of proof of Egyptian non-compliance, the International Court could be empowered to order all tolls paid to the U.N. commission.¹⁸⁹ Any annuity that might have been payable to Egypt could then be with-

185. For a variety of international administrative devices, see SAYRE, *EXPERIMENTS IN INTERNATIONAL ADMINISTRATION* (1919); Kunz, *Experience and Techniques in International Administration*, 31 *IOWA L. REV.* 40 (1945). There has also been a proposal for an International Straits Commission under the authority and direction of the United Nations General Assembly for the purpose of controlling the administration of all canals and straits currently of strategic importance. Open letter from Mrs. Franklin D. Roosevelt, Chairman, Board of Governors, American Association for the United Nations, Sept. 26, 1956.

186. Cf. Lawrence, *The Suez Canal in International Law*, in *MODERN INTERNATIONAL LAW* 37, 62-64 (1884) (proposal for the creation of an "Oriental Belgium of minute proportions" for the same area). Lord Granville at one time proposed neutralization of all Egypt. *Id.* at 62.

187. Similarly, the discriminatory activities were carried on before as well as after the 1954 withdrawal of British occupation troops.

188. Other means short of international operation may be available to take canal operation out of the hands of the Egyptian government. For example, a private organization might be commissioned by Egypt to manage the canal on a fixed-fee basis. However, such an organization would still be responsible to Egypt, and no ultimate impartial supervision would be provided; otherwise, there would for this purpose be no difference from U.N. operation.

189. Cf. the four-power proposal for interim operation of the Suez Canal, which would require payment of all tolls to the International Bank for Reconstruction and Development, some other international agency or a private bank, with 50% of the tolls to be paid to Egypt and 50% reserved for expense of canal clearance and other related costs. *N.Y. Times*, Feb. 20, 1957, p. 10, col. 2. This interim plan has, however, been rejected by President Nasser. *N.Y. Times*, March 10, 1957, § 1, p. 1, col. 8.

held until a United Nations inspection team reports compliance.¹⁹⁰ In the interim, to ensure that all funds paid to Egypt are properly used in the administration of canal operations and development, additional on-the-spot supervision may also be provided. United Nations seizure of canal facilities might be reserved as an ultimate sanction to be employed by the Secretary General when all other means have been exhausted. With a procedure supported by sanctions as described, Western fears that Egypt is not competent to operate the canal efficiently, progressively and fairly in the interest of the users could be largely allayed.

Egypt, on the other hand, may reject such a proposal.¹⁹¹ If this does happen, the users' ensuing action would depend upon their willingness to place unfettered control in Egypt's hands, relying on promises alone, rather than resorting to sterner measures including war to ensure their continued use of this vital waterway.

IV-V. ASSESSMENT AND DISBURSEMENT OF CANAL TOLLS

Because of the relationship between tolls and their allotment for development purposes, the fourth and fifth principles will be discussed jointly. Egypt might have insisted that determination of the manner in which charges will be fixed and the purposes for which the proceeds will be used is a sovereign right reserved to herself. The importance of tolls to Egypt and the users, however, renders agreement on the matter a necessary ingredient in a lasting convention. Egypt's willingness to confer on this issue provided at least one hopeful sign for an amicable settlement of the entire dispute.

Although there are alternate routes available to canal users, including those by air and land, the cost differential between such routes and a direct water route essentially renders all existing inter-oceanic canals natural monopolies. To prevent the exercise of monopoly power in fixing rates geared to maximize profit without regard to the public need for service, it is in the interest of the users that canal rates be regulated much the same as are rates charged by "public utilities" in the United States.¹⁹² If left uncontrolled, the operating power may disregard the users' needs and charge the highest price the traffic will bear. Since the Suez and Panama canals have so greatly shortened major water routes,¹⁹³ users of these canals will submit to much abuse before resorting to alternate routes.¹⁹⁴

190. Cf. Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. XII, 35 DEP'T STATE BULL. 824 (1956).

191. Egypt may feel that acceptance would imply an admission of incompetence and unfairness in its administration of the canal. See note 189 *supra*.

192. Cf. Wambaugh, *supra* note 163, at 236-38.

193. The Suez Canal route is approximately 4,700 miles, 12-18 days, shorter than the route around the Cape of Good Hope. U.S. News & World Report, Sept. 28, 1956, p. 35.

194. See Lawrence, *supra* note 186, at 67. In spite of the high canal tolls which were being charged before the recent stoppage, the diversion of ships from the Suez Canal around Africa or through the Panama Canal added 15% to liner freight rates. N.Y. Times, Nov. 8, 1956, p. 11, col. 1.

Implicit in toll regulation is the necessity for agreement on the service to be rendered in exchange for the tolls. A major contention of the users has been that Egypt will not provide fully adequate canal service.¹⁹⁵ Justified or not, such a concern on the part of the canal users is appropriate, for the worth of all other legal guarantees will ultimately be directly proportionate to the commercial or military value of the canal to those using it. Hence, all present or prospective users will seek the swiftest, safest transit for even their largest vessels at lowest rates. Assuming no discrimination among users, the profit motive of the operating instrumentality will necessarily conflict with that of each user.

As drafted, however, it is uncertain whether the words "manner of fixing tolls" contained in the fourth principle relate only to the basis of allocating tolls to the shippers, *e.g.*, gross tonnage, cargo value, etc., or also include agreement on the amount of the toll or, at least, the factors to be considered in computing the charge. This ambiguity may lessen the value of the parties' original agreement to the fourth principle if Egypt insists on the narrower interpretation. Egypt may demand that rates be set unilaterally, as the prerogative of the riparian sovereign, especially since the Universal Suez Canal Company heretofore had unrestricted power to set non-discriminatory tolls. The user nations, no doubt aware of the potential danger in such concentration of power, will probably construe the fourth principle as including negotiations to set the amount of the toll and the type of service to be rendered. Regardless of Egypt's interpretation, it seems certain that the users will seek negotiation in terms of the broader interpretation.

In partial recognition of the importance of toll and service regulation, the United States and Great Britain, with respect to the Panama Canal, have agreed that "conditions and charges of traffic shall be just and equitable."¹⁹⁶ The Constantinople Convention contained no similar reference to tolls and conditions of operation, although the guarantee of free access¹⁹⁷ implies, at least, that tolls not be prohibitive. The Versailles Treaty alone specifically limited tolls to those necessary for expenses.¹⁹⁸

A first step in fixing "reasonable" or "just and equitable" tolls would be to relate individual charges to the economic or military value which passage of the particular vessel would secure to the user. Operators have achieved a rough relationship for commercial vessels by setting the charge according to the size of the pay-load area, *i.e.*, in proportion to the cargo space or passenger quarters.¹⁹⁹ Warship rates are geared to displacement.²⁰⁰ The manner of allocating the toll to each vessel seems equitable

195. See, *e.g.*, statement by Secretary of State Dulles at 2d Plenary Session, First London Conference, Aug. 16, 1956, *THE SUEZ CANAL PROBLEM* 76.

196. Hay-Pauncefote Treaty art. III, § 1.

197. Constantinople Convention art. I.

198. Versailles Treaty arts. 382, 384; *cf.*, Montreux Convention art. II, annex I.

199. *E.g.*, 35 C.F.R. §§ 27.1(a), (b) (Supp. 1955). A cheaper rate is charged "on vessels in ballast without passengers or cargo." *Id.* § 27.1(b).

200. *E.g.*, *id.* § 27.1(c).

if it bears a reasonable relationship to the service that is rendered. By this standard, use of the aforementioned allocation bases seems satisfactory.

A second major step is to determine a "reasonable" level for the rate schedules. Probably none would seriously doubt that revenues must at least meet current expenses; the problem, however, concerns the make-up of the various expense items. Clearly all parties would consent to payment of necessary costs of operation and maintenance, but users may differ with the operator over the quantity and quality of the service required. In addition to meeting cost of maintenance and operation, in the case of the Panama Canal, tolls are used to support the Canal Zone government,²⁰¹ which is only incidentally concerned with operation and maintenance of the canal but which exercises a necessary supporting function. The Panama Canal Company also uses tolls to pay for interest on the initial investment²⁰² and for the annuities due the Republic of Panama as part payment for the original concession.²⁰³ An interesting question is raised by the fact that the United States has subsequently increased the annuity payments.²⁰⁴ In so doing, the United States has unilaterally increased expenditures and hence increased, or prevented a decrease in, the tolls, although this expense fails to reflect additional service to users. While this action may appear reasonable in view of changes in currency valuation, it reveals an area of potential abuse where adequate international controls are needed. As previously suggested,²⁰⁵ periodic review by a United Nations agency may provide one of the necessary institutional devices to control abuse of this character.

Once agreement is reached on expenses, basic policy differences may nevertheless remain regarding an allowance for profits. Most agree that reserves should be established from current income to provide for improvements²⁰⁶ and for meeting fixed costs in bad years,²⁰⁷ but views differ on the extent to which improvement should be undertaken.²⁰⁸ This problem

201. See report for fiscal year ending June 30, 1956, N.Y. Times, Nov. 11, 1956, § 5, p. 13, col. 5.

202. *Ibid.* Approved as "reasonable" in Wambaugh, *supra* note 163, at 237.

203. See N.Y. Times, Nov. 11, 1956, § 5, p. 13, col. 5.

204. The annuity was raised from an original \$250,000, Hay-Varilla Treaty art. XIV, to the equivalent of 430,000 balboas, beginning with 1934, General Treaty Between the United States and Panama, March 2, 1936, art. VII, 53 STAT. 1818, T.S. No. 945, and increased to the equivalent of 1,930,000 balboas in 1955, Treaty of Mutual Understanding and Cooperation, Jan. 25, 1955, art. I, 6 U.S. TREATIES & OTHER INT'L AGREEMENTS 2273, T.I.A.S. No. 3297. See Fenwick, *The Treaty of 1955 Between the United States and Panama*, 49 AM. J. INT'L L. 543, 544 (1955). Although the treaties specify balboa equivalent, payment has been made in an equal number of dollars. See, e.g., Supplemental Appropriation Act, 1956, c. 10, 69 STAT. 464 (1955).

205. See text at notes 188-91 *supra*.

206. Improvement allotments were included within the revised Indian plan, N.Y. Times, Oct. 17, 1956, p. 2, cols. 4-5, and the eighteen-nation proposal, see note 35 *supra*. Western experts predict a rapid decline in the usefulness of the canal unless vast improvements are soon undertaken. N.Y. Times, Oct. 14, 1956, § 1, p. 23, col. 1.

207. N.Y. Times, Oct. 17, 1956, p. 2, cols. 3-5. See Wambaugh, *supra* note 163.

208. For example, if no limits were placed on surplus profits, improvements would be undertaken only to the point of diminishing return. On the other hand, if Egypt were restricted to a reasonable annuity, larger sums would be made available for improvement.

existed when operation was in the Universal Suez Canal Company.²⁰⁹ Since the interests of the users never predominated within the company itself,²¹⁰ tolls remained high and improvements inadequate. In contrast, since profit is not sought in the operation of the Panama Canal,²¹¹ all necessary improvements in that canal can be undertaken with tolls kept at a relatively low level.²¹² However, the United States' policy of operating the Panama Canal on a non-profit basis is self-imposed.²¹³

Therefore, absent new international regulation, Egypt, having nationalized the Universal Suez Canal Company and cancelled the canal concession, is in no sense restrained from pursuing a profit-making policy similar to that of the old company.²¹⁴ Indeed, the diversion of profit to the Egyptian government was the reason for nationalization stated by President Nasser.²¹⁵ This objective was recognized in the eighteen-nation proposal resulting from the First London Conference, which called for an annuity payment to Egypt.²¹⁶ The proposal further provided that the amount of the annuity should increase and decrease with canal traffic. Such a flexible annuity would give Egypt an incentive to operate the canal in a way that would attract the largest amount of traffic. Also, this guards future users from the burden of a guaranteed annuity increasing the unit toll should the canal become of less significance.

The annuity might satisfy Egypt's need for canal revenue and yet place a reasonable limit on profits that may be derived from the tolls. A sizeable annuity to Egypt seems fair, since her acquiescence in any limitation on profits would represent a concession. Furthermore, Egypt desperately needs funds to raise her standard of living, and since the Suez Canal, located in Egyptian territory, constitutes one of Egypt's very few sources of revenue, it seems equitable for the nation to profit therefrom. Nevertheless, to ensure efficient and satisfactory operation, the annuity

209. WILSON, *THE SUEZ CANAL* 109-33 (1933).

210. *Ibid.*

211. C.Z. CODE tit. 2, § 412 (Supp. 1943).

212. *Ibid.*; WILSON, *THE SUEZ CANAL* 144-51 (1933).

213. See C.Z. CODE tit. 2, § 412 (Supp. 1943). *Contra*, OPPENHEIM, *THE PANAMA CANAL CONFLICT* 30 (1913): "According to Article III, No. 1, of the Hay-Pauncefote Treaty the charges for the use of the Canal shall be just and equitable. This can only mean that they shall not be higher than the cost of construction, maintenance, and administration of the Canal requires . . ."

214. In 1883 a group of British shipowners negotiated with de Lesseps a "London Programme" which provided, *inter alia*, that net profits above 25% should be applied to reduction of tolls until such tolls fell to five francs. WILSON, *THE SUEZ CANAL* 66 (1933). However, this agreement was "waived" by the London Committee of shipowners in 1900, and was never adhered to by the company. *Id.* at 112. Shareholders of the company have continually received immense dividends, *id.* at 109-30, at the expense of high tolls and poor service, which in turn have been reflected in high costs to shipowners and shippers and eventually in unnecessarily high prices to the commodity users. *But see, e.g.*, address by President of the Suez Canal Company at a meeting of shareholders, June 12, 1951, as quoted by Mahmoud Fawzi, U.N. SECURITY COUNCIL OFF. REC., 6th year, 550th meeting 17 (1951).

215. Address by President Nasser, Alexandria, Egypt, July 26, 1956, *THE SUEZ CANAL PROBLEM* 25, 27-28, U.S. News & World Report, Aug. 17, 1956, p. 77.

216. See note 35 *supra*; *cf.* Barcelona Statute art. III; Lawrence, *supra* note 186, at 69.

should be conditioned on periodic approval by the United Nations agency earlier suggested.²¹⁷

VI. ARBITRATION OF DISPUTES BETWEEN THE CANAL COMPANY AND EGYPT

Compulsory arbitration of differences between the canal company and Egypt represents an adjustment of Egyptian rights, for under the old concessions and agreements arbitration is not necessarily required for all disputes. According to an 1866 agreement between the canal company and Egypt, "any disputes that may arise between the Egyptian Government and the Company shall . . . be submitted to the local Courts and settled according to the laws of the country."²¹⁸ In at least one situation, however, arbitration may have been required: In 1968, at the end of the prescribed ninety-nine year period,²¹⁹ when Egypt was to take over the company, the value to be paid the company for materials and supplies was to be fixed "either by amicable agreement or on the basis of an opinion of experts."²²⁰ This clause may easily be construed as requiring arbitration, and since it was to be operative upon termination of the canal company it may be applicable to the present situation. However, premature nationalization in itself violates a different clause of the same article of the 1856 concession,²²¹ so Egypt may also have considered herself no longer bound by the arbitration clause.

No such arbitration provision existed, however, for determining the compensation to be paid the stockholders, and Egypt might have legitimately refused arbitration on this matter. Indeed, there seems little scope for arbitration in the definite standard set forth by Egypt's nationalization decree: compensation at the rate prevailing in the closing quotations of the Paris Stock Exchange on the day preceding issuance of the decree, conditioned on the prior return of all canal company assets to the Egyptian government.²²² It is possible that the sixth principle might now subject the adequacy of such compensation to arbitration, since settlement with the stockholders need not be handled directly but may be achieved by payment to the company, in which case Principle VI could be invoked as governing

217. See text at notes 188-91 *supra*.

218. Convention Between the Viceroy of Egypt and the Compagnie Universelle du Canal Maritime de Suez, Feb. 22, 1866, art. XVI, *THE SUEZ CANAL PROBLEM* 15; cf. Joseph Shalam and Sons v. Suez Canal Co., Feb. 17, 1930, Civil Court of Cairo, [1929-1930] ANN. DIG. PUB. L. CAS. 137 (Lauterpacht ed. 1935).

219. See text at note 14 *supra*.

220. Act of Concession, 1856, art. XVI. The 1854 concession contained a similar clause: "On the expiration of the concession, . . . an agreement reached amicably or by arbitration shall determine the compensation to be allotted to the company for the transfer of its equipment and movable property." Act of Concession, 1854, art. X.

221. Act of Concession, 1856, art. XVI.

222. President of the Republic Order Concerning the Issuance of Law No. 285 of 1956 on the Nationalization of the Universal Company of the Suez Maritime Canal, July 26, 1956, art. I, *THE SUEZ CANAL PROBLEM* 30, 31. See also the subsequent alternative offer to pay the average exchange price over the preceding five years. N.Y. Times, Oct. 9, 1956, p. 14, col. 1.

disputes with "the company." In any event, Egypt has recently declared its willingness to arbitrate "the question of compensation and claims in connection with the nationalization of the Suez Canal Maritime Company." ^{222a} This conciliatory approach may well be due to the existence of large amounts of canal company assets frozen abroad.²²³

Two problems remain with regard to the sixth principle. First, its scope should be widened beyond disputes involving the company. Since the current differences with Israel require diplomatic negotiation rather than judicial decision, most facets of that dispute were sensibly omitted from the arbitration scheme. However, the legality of one aspect of the Egyptian-Israeli dispute, Egypt's searching of neutral ships for "contraband," might well be tested by an impartial tribunal.²²⁴ It may similarly be desirable to adjudicate the validity of Egyptian claims ²²⁵ arising out of the Anglo-French invasion, as well as the financial responsibility for the current canal clearance operation, although the latter question will probably be avoided by securing necessary funds through a temporary surcharge on canal tolls.²²⁶

Secondly, there must be available some method short of the use of force for gaining compliance with any decisions. Perhaps this was implied in the sixth principle's directive to find "suitable provisions for payment of sums found to be due." One means of securing a measure of Egyptian compliance with decisions is by withholding assets of the Egyptian government and the canal company that were blocked shortly after nationalization of the company. Conversely, Egypt holds a similar weapon, the assets of British and French firms recently frozen in Egypt. The United Nations could be made stakeholder of these funds, to be returned to the proper party upon compliance with the arbitration decision.

CONCLUSION

Until the relationship among nations becomes such that each recognizes an obligation to abide by its agreements, as construed by an impartial arbiter whose jurisdiction has been conceded, a convention lacking a provision whereby compliance can peaceably be enforced is of questionable value to the parties thereto. The extent to which one nation is willing to rely on a mere promise of another depends upon its appraisal of the other's good faith. Few will seriously challenge the good faith of the United States

^{222a} N.Y. Times, March 29, 1957, p. 2, col. 8.

²²³ See Note, *Nationalization of the Suez Canal Company*, 70 HARV. L. REV. 480, 486 (1957).

²²⁴ Although it has been reported recently that Egypt might submit to a decision of the International Court of Justice on the question of Israeli rights to passage through the canal, N.Y. Times, March 11, 1957, p. 1, col. 7, this course seems unlikely in view of more recent statements indicating Egypt will continue to bar Israeli ships, N.Y. Times, March 16, p. 1, col. 8, and the implied rejection of a judicial settlement contained in the recent Egyptian memorandum. See text following note 236 *infra*.

²²⁵ N.Y. Times, Dec. 25, 1956, p. 3, cols. 3-4.

²²⁶ N.Y. Times, April 3, 1957, p. 4, col. 1.

in abiding by its promise to administer fairly the Panama Canal. Unfortunately, the Egyptian government's activities of the past few years, especially its refusal to obey the 1951 Security Council resolution and its premature termination of the canal concession, have not indicated a reassuring sensitivity to moral suasion. Consequently, unless a new agreement provides some measure of control over Egyptian operation, as by the suggested U.N. Commission and the right to withhold tolls, the insecurity and mistrust which prompted the Anglo-French invasion will continue, perhaps reappearing in some disruptive form.

President Nasser's continued refusal to accept more stringent international controls may best be understood by recognizing the strength of Egypt's bargaining position,²²⁷ which stems from its possession of the canal and which thus far has not been counter-balanced by pipelines and super-tankers. Moreover, the prospect that force will be used by the Western powers now appears remote and the effective imposition of economic sanctions would be both difficult and costly. Accordingly, President Nasser's recent unilateral promulgation of a formula for governing future operation of the Suez Canal²²⁸ should have come as no surprise to informed observers. The United States, nevertheless, is continuing to press for negotiations on an international agreement which would bring these proposals into alignment with the agreed six principles,²²⁹ and Israel will probably continue to press for canal passage.

Although the recent Egyptian memorandum purports to be an "international instrument,"²³⁰ and is to be "deposited and registered with the Secretariat of the United Nations,"²³¹ it is doubtful that a unilateral declaration could create international rights and obligations.²³² Furthermore, the provisions contained therein fall short of providing a fair and lasting resolution of the Suez problem. Some sections of the memorandum, however, might fit within the general phraseology of many of the six principles.²³³ But as a whole it will be unsatisfactory to the users,²³⁴ primarily

227. See Wall Street Journal, April 5, 1957, p. 1, col. 6.

228. N.Y. Times, March 29, 1957, p. 2, cols. 4-8.

229. Secretary of State Dulles' News Conference, April 2, 1957, N.Y. Times, April 3, 1957, p. 8, col. 2.

230. N.Y. Times, March 29, 1957, p. 2, col. 8.

231. *Ibid.* The U.N. Secretariat is apparently empowered to accept for registry and publication only treaties and international agreements, U.N. CHARTER art. 102, ¶ 1, which should exclude such a unilateral declaration.

232. Secretary of State Dulles' News Conference, April 2, 1957, N.Y. Times, April 3, 1957, p. 8, col. 2.

233. The reaffirmation of the Constantinople Convention implies a guarantee of free and open transit without discrimination, outlined in the first principle. Operation by the Egyptian Suez Canal Authority and promulgation of a Canal Code certainly reflect a respect for Egyptian sovereignty, provided in principle two. Furthermore, limiting toll increase in the next twelve months to 1% and allocating 25% of gross receipts for improvements might also appear to satisfy principles four and five. The provision for arbitration of "the question of compensation and claims in connection with the nationalization of the Suez Canal Maritime Company" seems to meet fully the letter and spirit of principle six. N.Y. Times, March 29, 1957, cols. 4-8.

234. N.Y. Times, April 1, 1957, p. 1, col. 8; Secretary of State Dulles' News Conference, April 2, 1957, N.Y. Times, April 3, 1957, p. 8, cols. 2, 5.

because it recognizes no international control of operations or tolls.²³⁵ Significantly, the statement provides for settlement by arbitration or judicial process of "differences arising between the parties" to the Constantinople Convention.²³⁶ This is of some value, but since Israel and the United States, among others, were not signatories to the Constantinople Convention and thus are not included within the provision's terms, this concession, like the pronouncement as a whole, will not satisfy the interested parties.

Political and economic pressures may cause the user nations to submit to terms less desirable than they would otherwise approve. However, if the eventual agreement does not include machinery for effective enforcement of the promises contained therein, by means short of violence, the solution will at best be temporary.

J. F. McC., Jr.

235. Although a portion of gross receipts is to be allocated for development purposes, there is no indication as to what will be done with the remainder of the receipts, nor any incentive provided for reducing tolls.

236. N.Y. Times, March 29, 1957, p. 2, col. 5.